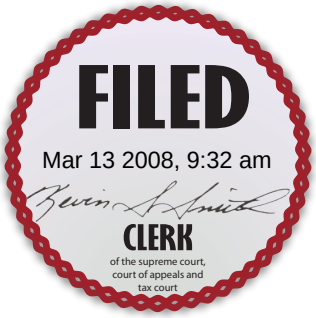


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
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| RUDY CARDWELL, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 10A05-0703-CR-129 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Jerome K. Jacobi, Judge
Cause No. 10D01-0509-FB-84

**March 13, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Following a jury trial, Rudy Cardwell was found guilty of two counts of neglect of a dependent as class B felonies.[1] Cardwell raises the following restated issues:

1. Did the trial court properly grant the State's motion to amend Count II of the Charging Information during trial?

2. Did the State present sufficient evidence to support Cardwell's conviction for neglect of a dependent as alleged in Count II of the Charging Information?

3. Was there a material variance between the crime alleged in Count II of the Charging Information and the evidence introduced by the State at trial?

4. Was Cardwell's sentence appropriate?

We affirm.

In September of 2005, Cardwell resided in Jeffersonville, Indiana with his girlfriend Star Gentry, their daughter H.G., and Gentry's three-year-old daughter S.G. Although S.G. was not his biological child, Cardwell testified that he acted as S.G.'s father and helped Gentry raise her. Gentry worked nights at a local convenience store. While she was at work, Cardwell took care of S.G. and H.G.

On September 8, 2005, Cardwell woke up at around 5:30 a.m. Gentry was at work, so Cardwell woke up S.G. and H.G. Cardwell gave S.G. spaghetti for breakfast and then momentarily left the kitchen. When he returned to the kitchen, Cardwell slipped and fell in some spaghetti that S.G. had thrown on the floor. This angered Cardwell. Noticing that S.G. was messy from the spaghetti, Cardwell took her to the bathroom to wash her hands. Cardwell turned on the sink, took hold of S.G. at the elbows, and held

[1] Ind. Code Ann. § 35-46-1-4(b)(2) (West, PREMISE through 2007 1st Regular Sess.).

S.G.'s hands under the water. The water coming out of the sink faucet was particularly hot because the water heater was turned up to its maximum setting. S.G. began screaming that the water was hot and that it was hurting her hands. Cardwell ignored her and continued to hold her hands under the water. Cardwell eventually removed S.G.'s hands from the water. He immediately noticed that S.G.'s hands were a pinkish color and hot to the touch. He put S.G.'s hands in some cold water, and then placed some gel on the hands and bandaged them.

Sometime between 6 a.m. and 7 a.m., Cardwell placed S.G. and H.G. in the car and drove to pick up Gentry at work. Cardwell told Gentry about what happened with S.G. and then the group drove back home. Cardwell and Gentry discussed S.G.'s injuries and determined that Cardwell could face criminal liability for causing the burns. To avoid this, Cardwell and Gentry mutually decided to not immediately obtain medical treatment for S.G. Instead, Gentry spent much of the day coaching S.G. to say that Gentry had accidentally caused the burns by washing her hands.

At 4:45 p.m., Gentry took S.G. to the Clark County emergency room where she received treatment from nurse Teresa Martin. Martin testified that S.G. was crying inconsolably and that her hands were bandaged with a dirty gray t-shirt. When she removed the bandages, Martin saw skin hanging from S.G.'s fingers. On a scale of zero to ten, with zero being no pain and ten being high pain, Martin rated S.G.'s pain level at ten.

Due to the severity of her burns, S.G. was transferred to Kosair Children's Hospital in Louisville, Kentucky around 6 p.m. where Dr. In K. Kim treated her. He

noted that S.G. was in significant pain and determined that she had suffered second and third degree burns on both of her hands. Dr. Kim testified that burn injuries like the ones sustained by S.G. get worse over time due to inflammation if they are not treated. It was his opinion that the delay in obtaining treatment for S.G. caused her to suffer extreme pain.

While S.G. was being treated at Kosair Children's Hospital, Detective Charles Thompson of the Jeffersonville Police Department arrived and spoke with Gentry. She initially told Detective Thompson that she had accidentally caused S.G.'s burns. When pressed, however, Gentry admitted that Cardwell caused the burns. Detective Thompson then spoke with Cardwell who confirmed that he had caused S.G.'s burns by holding her hands under the water.

On September 16, 2005, the State charged Cardwell with two counts of neglect of a dependent as a class B felony.[2] Count I alleged that Cardwell voluntarily assumed the care of S.G. and neglected her by knowingly or intentionally burning her with hot water, which resulted in serious bodily injury. Count II read as follows:

> COUNT II – NEGLECT OF A DEPENDENT (CLASS B FELONY)
> On or about September 8, 2005, in Clark County in the State of Indiana, RUDY WAYNE CARDWELL, having the care of three (3) year old [S.G.], whether assumed voluntarily or because of a legal obligation, did knowingly or intentionally place [S.G.] in a situation that endangered her life or health, by failing to seek prompt medical attention for [S.G.], who had suffered serious bodily injury, to-wit: severe burns to her hands.

*Appellant's Appendix* Vol. I at 7.

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[2] The State also charged Cardwell with conspiracy to commit perjury as a class D felony. This charge, though, was voluntarily dismissed by the State prior to Cardwell's jury trial.

Cardwell's jury trial began on November 14, 2006. After the State rested, Cardwell moved for a directed verdict on Count II arguing that the delay in seeking treatment for S.G. did not cause serious bodily injury. The trial court denied Cardwell's motion. The State then moved to amend Count II so that it would read as follows:

> COUNT II – NEGLECT OF A DEPENDENT (CLASS B FELONY)
> On or about September 8, 2005, in Clark County in the State of Indiana, RUDY WAYNE CARDWELL, having the care of three (3) year old [S.G.], whether assumed voluntarily or because of a legal obligation, did knowingly or intentionally place [S.G.] in a situation that endangered her life or health, by failing to seek prompt medical attention for [S.G.], *resulting in serious bodily injury*, to-wit: severe burns to her hands.

*Id.* at 103 (emphasis added). Cardwell's counsel objected to the amendment arguing that it changed the nature of the offense and the possible penalties. The trial court granted the State's motion to amend Count II, and Cardwell's counsel did not seek a continuance.

The jury ultimately found Cardwell guilty of both counts of neglect of a dependent. The trial court held a sentencing hearing on December 19, 2006. It found that Cardwell's criminal history and S.G.'s age were aggravating factors. No mitigating factors were found. The trial court imposed consecutive seventeen-year sentences on both of Cardwell's convictions for a total sentence of thirty-four years. This appeal ensued.

1.

Cardwell first argues that the trial court erred when it granted the State's motion to amend Count II of the charging information during trial. He argues that the change the State sought to make to Count II was an amendment of substance and that it was improper for the trial court to grant the amendment because it was not made thirty days

before the omnibus date as required by Indiana Code Ann. § 35-34-1-5(b)(1) (West, PREMISE through 2007 1st Regular Sess.).

A charging information may be amended at various stages of a proceeding, depending on whether the amendment is to the form or to the substance of the original information. *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). Amendments to a charging information are governed by I.C. § 35-34-1-5. At the time the State sought to amend Count II here,[3] subsection (a) of this statute permitted an amendment to the charging information at any time "because of any immaterial defect," and listed nine examples. I.C. § 35-34-1-5(a). Similarly, subsection (c) permitted "at any time before, during or after the trial, . . . an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant." I.C. § 35-34-1-5(c). Subsection (b), however, expressly limited the time for certain other amendments as follows:

> (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
>
> (1) thirty (30) days if the defendant is charged with a felony; or
>
> (2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
>
> before the omnibus date.

I.C. § 35-34-1-5(b).

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[3] After our Supreme Court's decision in *Fajardo v. State*, 859 N.E.2d 1201, the General Assembly amended I.C. § 35-34-1-5. The General Assembly made various changes to subsection (b) of that statute. We interpret the version of the statute that was in effect at the time of Cardwell's trial.

Our Supreme Court has explained:

> This statutory language thus conditions the permissibility for amending a charging information upon whether the amendment falls into one of three classifications: (1) amendments correcting an *immaterial defect*, which may be made at any time, and in the case of an unenumerated immaterial defect, only if it does not prejudice the defendant's substantial rights; (2) amendments to *matters of form*, for which the statute is inconsistent, subsection (b) permitting them only prior to a prescribed period before the omnibus date, and subsection (c) permitting them at any time but requiring that they do not prejudice the substantial rights of the defendant; and (3) amendments to *matters of substance*, which are permitted only if made more than thirty days before the omnibus date for felonies, and more than fifteen days in advance for misdemeanors.

*Fajardo v. State*, 859 N.E.2d at 1204-05 (emphasis in original).

Thus, our first step in evaluating the permissibility of amending a charging information is to determine whether the amendment is addressed to an immaterial defect, a matter of form, or a matter of substance. *Absher v. State*, 866 N.E.2d 350 (Ind. Ct. App. 2007). An amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment; and (b) the accused's evidence would apply equally to the information in either form. *Fajardo v. State*, 859 N.E.2d 1201. An amendment is one of substance only if it is essential to making a valid charge of the crime. *Id.*

In this case, Count II of the original information alleged that on September 8, 2005, Cardwell committed neglect of a dependent as a class B felony by "knowingly or intentionally plac[ing] [S.G.] in a situation that endangered her life or health, by failing to seek prompt medical attention for [S.G.], who had suffered serious bodily injury, to-wit: severe burns to her hands." *Appellant's Appendix* Vol. I at 7. Count II of the amended

information alleged that on September 8, 2005, Cardwell committed neglect of a dependent as a class B felony by "knowingly or intentionally plac[ing] [S.G.] in a situation that endangered her life or health, by failing to seek prompt medical attention for [S.G.], resulting in serious bodily injury, to-wit: severe burns to her hands." *Id.* at 103. The only difference between the original and the amended information was that the words "who had suffered" were removed and the words "resulting in" were added. The class of the offense, the date, the location of the offense, and the specific conduct alleged did not change. Because the class of offense and specific conduct alleged did not change, Cardwell had the same defenses available to him and his evidence would apply equally to the information in either form. Therefore, we conclude that the State's amendment of Count II was an amendment of a matter of form rather than a matter of substance.

Because the amendment of Count II was an amendment of a matter of form, we next determine whether allowing this amendment prejudiced Cardwell's substantial rights. *Jones v. State*, 863 N.E.2d 333 (Ind. Ct. App. 2007). A defendant's substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights. *Id.* Our Supreme Court has stated that "[u]ltimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201.

We conclude that Cardwell's substantial rights were not violated by the amendment. Cardwell had sufficient notice of the charge. In the original information, Count II charged Cardwell with neglect of a dependent as a class B felony. The amended charge did not change the class of offense or the specific criminal conduct that was alleged. Cardwell had the opportunity to be heard regarding the amendment because the trial court permitted him to present an argument against it before granting the State's motion to amend the information. After the trial court granted the State's motion, Cardwell did not seek a continuance for additional time to prepare an adequate defense, even though this is provided for under I.C. § 35-34-1-5(d).

The actions of Cardwell's counsel at trial are also significant. In order to prove neglect of a dependent as a class B felony, the State was required to show that the alleged neglect resulted in serious bodily injury. I.C. § 35-46-1-4(b)(2). No other form of neglect of a dependent, whether it is as a class A, C, or D felony, requires proof of serious bodily injury. *See* I.C. § 35-46-1-4(a), (b)(1), (b)(3), and (b)(4). After the State rested but before it moved to amend the information, Cardwell's counsel moved for a directed verdict on Count II arguing that the delay in seeking treatment for S.G. did not cause serious bodily injury. This indicates that Cardwell and his counsel knew, based on the original information, that the State had charged him with neglect of a dependent as a class B felony. It also suggests that Cardwell had a reasonable opportunity to prepare for and defend against this charge. Therefore, we conclude the trial court properly granted the State's motion to amend Count II of the charging information.

2.

Cardwell contends that the State did not present sufficient evidence to support his conviction for neglect of a dependent as alleged in Count II. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Cline v. State*, 860 N.E.2d 647 (Ind. Ct. App. 2007). We will only consider the evidence most favorable to the judgment and reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

The jury found Cardwell guilty of neglect of a dependent as a class B felony. I.C. § 35-46-1-4(a) provides as follows:

> A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> (1) places the dependent in a situation that endangers the dependent's life or health;
>
> ***
>
> commits neglect of a dependent, a Class D felony.

The offense, however, is elevated to a class B felony if it results in serious bodily injury. I.C. § 35-46-1-4(b)(2). Serious bodily injury includes bodily injury that causes extreme pain. I.C. § 35-41-1-25(3).

The evidence introduced at trial indicates that Cardwell acted as S.G.'s father even though she was not his biological child. Cardwell was involved in raising S.G. He regularly cared for S.G. while Gentry was at work. This care involved waking S.G. up in the morning, fixing her meals, and helping her wash. Based on this evidence, the jury could reasonably conclude that Cardwell voluntarily assumed the care of S.G. *See Fisher*

*v. State*, 548 N.E.2d 1177 (Ind. Ct. App. 1990) (concluding it was reasonable to infer defendant voluntarily assumed the care of a child that was not his biological child where defendant allowed child and its mother to reside in his home, paid for child's food and diapers, performed household duties like cooking and cleaning, and occasionally bathed and held child).

Cardwell argues that he did not place S.G. in a situation that endangered her life or health. He states that, at the most, S.G. was in his care for thirty minutes before he picked up Gentry at work. Once Gentry arrived, Cardwell contends that because she was S.G.'s biological mother and legal guardian, she was responsible for deciding whether to obtain medical treatment for S.G. He argues that the decision to delay seeking medical treatment for S.G. was made solely by Gentry, and thus, Gentry was responsible for placing S.G. in a situation that endangered her health.

Evidence introduced by the State, though, shows that it was Cardwell who caused the burns on S.G.'s hands. After removing S.G.'s hands from the water, Cardwell noticed that they were a pinkish color and were hot to the touch. Apparently fearing that S.G.'s hands were burned, Cardwell ran them under cold water, placed a gel on them, and bandaged them. When Cardwell picked up Gentry at work, he told her about S.G.'s injuries. Cardwell and Gentry discussed the situation and concluded that Cardwell could face criminal liability for causing the burns. In order to avoid this, Cardwell and Gentry mutually decided that they would not seek immediate medical treatment for S.G. and that Gentry would coach S.G. to say that Gentry accidentally caused her burns. Although

S.G.'s hands were burned sometime between 6 a.m. and 7 a.m., Gentry and Cardwell did not take her to the emergency room until later that day at 4:45 p.m.

We acknowledge that conflicting evidence was introduced suggesting that the decision to not immediately seek medical care was solely made by Gentry. Nevertheless, we must respect the jury's exclusive province to weigh conflicting evidence. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005) (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Based on the evidence introduced at trial, the jury could reasonably conclude that Cardwell was aware of S.G.'s injuries and that he played a significant part in deciding with Gentry to not seek immediate medical care for S.G. Sufficient evidence was introduced to show that Cardwell placed S.G. in a situation that endangered her life or health by delaying prompt medical attention.

Cardwell also argues that the State failed to show that S.G. suffered serious bodily injury as a result of the delay in seeking medical treatment. At trial, the State argued that the delay in seeking medical treatment resulted in serious bodily injury to S.G. in that she suffered extreme pain. Cardwell asserts that the State may have shown that the burns S.G. suffered caused extreme pain, but that it did not show that the delay in medical treatment caused extreme pain.

Sufficient evidence was presented to show that the delay in seeking treatment caused S.G. to suffer extreme pain. Teresa Martin, the nurse who treated S.G. at the Clark County emergency room, testified that S.G. was crying inconsolably and rated her pain at ten on a scale where ten was the highest possible level of pain. Dr. Kim testified that when he first saw S.G., she was experiencing significant pain due to second and third

degree burns to both of her hands. He stated that burn injuries like the ones sustained by S.G. get worse over time if they are not treated. He believed that S.G. suffered extreme pain due to the delay in seeking treatment. Relying on this evidence, the jury could properly conclude that the delay in seeking treatment for S.G. worsened the condition of the burns to her hands causing her extreme pain.

Therefore, the State presented sufficient evidence to sustain Cardwell's conviction for neglect of a dependent as a class B felony as alleged in Count II.

3.

Cardwell next argues that his conviction for neglect of a dependent as a class B felony under Count II must be reversed because there was a material variance between the crime alleged in Count II and the evidence presented at trial. He notes that the serious bodily injury alleged by the State in Count II was the severe burns S.G. sustained on her hands, but at trial, the evidence presented by the State of serious bodily injury was the extreme pain S.G. suffered. Cardwell did not make an objection at trial regarding any alleged material variance. The failure to make a specific objection at trial waives any material variance issue. *Hall v. State*, 791 N.E.2d 257 (Ind. Ct. App. 2003). Therefore, this issue is waived.

4.

In sentencing Cardwell, the trial court found two aggravating circumstances. The first was Cardwell's criminal history, which consisted of three unrelated misdemeanor convictions for disorderly conduct, assault, and terroristic threatening. The second aggravating factor was S.G.'s age, which was three at the time of the offense. The trial

court found no mitigating circumstances. The trial court imposed consecutive seventeen-year sentences on both of Cardwell's convictions. Cardwell argues that his sentence was inappropriate.

When reviewing a sentencing challenge under our advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which should include reasonably detailed reasons or circumstances for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Second, the reasons or omission of reasons given for choosing a particular sentence are reviewable on appeal for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* The weight given to any aggravators or mitigators found by the trial court is not subject to appellate review. *Anglemyer v. State*, 868 N.E.2d 482. The merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). *Id*. That rule provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

Cardwell argues the trial court gave too much weight to the aggravating factors, which were his criminal history and S.G.'s age. Our Supreme Court has previously explained that under our advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing

a sentence. *Anglemyer v. State*, 868 N.E.2d 482. Therefore, the weight the trial court gives to any aggravating circumstances is not subject to appellate review. *Id.*

Cardwell contends that the trial court abused its discretion when it failed to find certain mitigating factors. He asserts that the trial court should have found his expression of remorse, the hardship incarceration would create for his family, and the lesser sentence Gentry received for her involvement in this matter were mitigating circumstances. Although the trial court must consider evidence of mitigating factors presented by a defendant, it is not required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently mitigating. *Pennington v. State*, 821 N.E.2d 899 (Ind. Ct. App. 2005). On appeal, an allegation that the trial court failed to identify or find mitigating circumstances requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

At his sentencing hearing, Cardwell stated that he was sorry about what happened to S.G. The trial court did not find this statement of remorse to be a mitigating factor. Considering that Cardwell, who acted as three-year-old S.G.'s father, caused second and third degree burns on both of S.G.'s hands and then decided with Gentry to delay seeking medical treatment for S.G. so that he could avoid criminal liability, we cannot say that the trial court erred in not finding Cardwell's statement of remorse to be a mitigating circumstance.

Cardwell argues the trial court should have found the hardship incarceration would create for his family to be a mitigating factor. Cardwell is the father of four teenage

daughters. He is also the father of Gentry's child H.G., and of a child that Gentry was pregnant with at the time of sentencing. No evidence was presented by Cardwell to suggest that his four teenage daughters depended upon him for support. Furthermore, two of Cardwell's teenage daughters testified at the sentencing hearing that they had not seen Cardwell in a year. The trial court was not required to find that the hardship to Cardwell's family was a mitigating factor because evidence of this was not significant nor was it clearly supported by the record.

Cardwell also contends that the trial court should have considered the sentence Gentry received for her involvement in this matter. Like Cardwell, Gentry was charged with neglect of a dependent as a class B felony for failing to obtain timely medical treatment for S.G. She was ultimately convicted of neglect of a dependent as a class D felony and received a one and one half year sentence. We first note that Cardwell and Gentry were not convicted of the same class of offense. Both were convicted of neglect of a dependent, but Cardwell's conviction was as a class B felony while Gentry's was as a class D felony. The advisory sentences for these offenses are different. *See* Ind. Code Ann. § 35-50-2-5 (West, PREMISE through 2007 1st Regular Sess.) (advisory sentence for a class B felony is ten years); I.C. § 35-50-2-7 (advisory sentence for a class D felony is one and one half years). Cardwell's and Gentry's sentences naturally reflect these differences. Cardwell's sentence was enhanced, at least in part, because of his criminal history. The record does not reveal that Gentry had any prior criminal history before this incident that would warrant an enhancement of her sentence. We further note that "no authority requires co-participants to receive proportional sentences." *Lopez v. State*, 527

N.E.2d 1119, 1133 (Ind. 1988). The trial court did not err in failing to find this to be a mitigating factor.

Cardwell last argues that his sentence was inappropriate. We begin by considering the nature of the offense. Here, Cardwell caused second and third degree burns on both of three-year-old S.G.'s hands by intentionally holding S.G.'s hands under scalding hot water. When S.G. began screaming that the water was hot and was burning her, Cardwell ignored her and continued to hold her hands under the water. Although Cardwell was aware that S.G.'s hands were injured, he and Gentry mutually agreed to not immediately obtain medical treatment for S.G. so that Cardwell could avoid criminal liability.

As to Cardwell's character, we note that he has a criminal history consisting of three misdemeanor convictions. Although the record does not reveal the specifics of the offense, Cardwell's conviction in 2005 for terroristic threatening is of particular concern. After considering the nature of the offense and the character of the offender, we cannot say that Cardwell's sentence is inappropriate.

Judgment affirmed.

SHARPNACK, J., concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

# IN THE
# COURT OF APPEALS OF INDIANA

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| RUDY CARDWELL, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 10A05-0703-CR-129 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

**Judge, Riley, concurring in part and dissenting in part with separate opinion.**

I respectfully concur with parts 1., 2., and 3., but dissent to part 4. I find that Cardwell's sentence is inappropriate based on the following considerations: Cardwell finished the ninth grade; at the sentencing hearing, Cardwell's defense attorney had to read the Pre-Sentence Report to him because he could not read it himself due to poor eyesight; Cardwell had been convicted of three misdemeanors; and it was also shown that he is the father of three daughters and his girlfriend was expecting his child at the time of sentencing.

In addition, a neighbor, Mr. Brown, testified that Cardwell was immature but a hard worker. Cardwell's eighteen-year-old daughter testified that she never saw him hurt

his kids or harm anybody. She called him a good person and testified that he was going blind. His seventeen-year-old daughter testified that he never physically disciplined his children and was always calm and gentle. Cardwell testified from "the bottom of [his] heart" that he did not intentionally mean to hurt her." (Tr. P. 364).

Because these mitigating circumstances were not appropriately considered, I would sentence Cardwell to 17 years on both counts and run them concurrent to each other.